UNITED STATES SUPREME COURT.

October Term, 1894.

No. 229

WILLIAM U. GLASS, Plaintiff in Error,

versus

POLICE JURY, PARISH OF CONCORDIA, Defendant in Error.

J. D. ROUSE,
WM. GRANT,
Attorneys for Plaintiff in Error.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1899.

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WILLIAM C. GLASS, PLAINTIFF IN ERROR,

versus

POLICE JURY, PARISH OF CONCORDIA, DEFENDANT IN ERROR.

STATEMENT.

The original petition in this suit was filed in the Circuit Court of the United States for the Eastern Disrtict of Louisiana, on the 2d of November, 1877, by the plaintiff, a citizen of the State of Missouri, against the defendant, a citizen of the State of Louisiana, to recover the amount of certain instruments in writing, in the following form:

"ENGINEER'S OFFICE,
"Parish of Concordia, January 20, 1863.

"*To the Treasurer of the Parish of Concordia:*

"Pay Matthew Carr or order, $13,554, and charge same to account of general levee fund.

"(Signed) WILLIAM EUSTIS, *Levee Engineer.*"

The plaintiff acqured title to the said warrants through a judicial sale of the assets of the succession of Carr, made by the sheriff of said parish under authority of an order of the Probate Court which had the administration of his estate.

The particular averment in question affecting the jurisdiction of the Circuit Court is contained in plaintiff's amended petition, and is as follows;

"Petitioner further avers that said warrants or orders were each in form similar to 'Exhibit A,' hereto annexed and made part of this petition, and were made payable to Matthew Carr or order, who was a citizen of the State of Louisiana, and were owned by him at the date of his death, in 1863, and were part of his estate; that his succession was opened in the Probate Court of the said parish of Concordia, and that plaintiff acquired the ownership of said warrants or orders, and the bonds issued in exchange therefor under said funding ordinance, by purchase at a sale of the assets of the estate of said Carr on the 22d day of May, 1868, made by the sheriff of said parish, under the authority of an order of said Probate Court having the administration of said succession, and that plaintiff was a citizen of the State of Missouri at the time of said purchase" (R., p. 2).

To this amended petition defendant filed an exception averring that the Circuit Court was without jurisdiction, "because it appears that suit is brought upon a chose in action acquired by the plaintiff from a citizen of the State of Louisiana on which chose in action the said original holder could not sue in this Court" (R., page 3).

As the exception admitted the facts averred in the amended petition it was submitted to the Court on the question of law presented by the pleadings.

The Court sustained the exception and has certified that the cause was heard solely on the question of jurisdiction (R., page 5).

The case has been removed to this Court for review on the jurisdictional question certified under Section 5 of the act of March 3, 1891, on the following assignments of error:

1. The Circuit Court erred in maintaining defendant's exception to its jurisdiction, and dismissing plaintiff's suit.

2. The Circuit Court erred in holding that the judicial sale of the warrants sued on in this cause made in the Succession

of Matthew Carr, deceased, was an assignment of said warrants, and that the plaintiff who purchased the same at such sale is an assignee thereof incapable of suing thereon in the Circuit Court, although a citizen of Missouri, because neither the said Matthew Carr in his lifetime, nor his legal representatives since his death are averred to have possessed the requisite citizenship to sue in that Court if no assignment had been made, and in maintaining for these reasons the defendant's exception to the jurisdiction of the Circuit Court" (R., page 7).

ARGUMENT.

The only question presented by the record is whether the judicial sale of the choses in action sued on herein was an assignment, and whether the plaintiff who acquired them at such sale is an assignee thereof, within the meaning of the Act of March 3, 1875, which regulated the jurisdiction of the Circuit Court when this suit was instituted. The restriction on that jurisdiction as prescribed by said act is in the following language:

"Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

The contention of the defendant is that the sale of the warrants sued on, made by the sheriff under the order of the Probate Court, was an assignment, and that unless Matthew Carr, in his lifetime, or his legal representatives after his death, could have sued in the Circuit Court, plaintiff cannot, although he possesses the necessary citizenship.

We concede that neither Carr, his heirs, nor the administrator of his estate, nor the sheriff who made the sale, nor the judge who ordered the sale, possessed the necessary citizenship to sue on the warrants in the Circuit Court at the time this action was brought. But we assert, on principle, that a purchaser at a sale made by authority of a probate

court derives title from none of these sources, but takes title by the adjudication of the law acting directly, *in rem*, upon the property itself. In this respect courts of probate in Louisiana stand upon the same footing as similar courts in the other States of the Union, as will be seen by a brief reference to her statutes.

"Courts of Probate are especially established for the opening and settling of all successions" (Code of Practice, Art. 921.

By Sec. 5 of Art. 2924 of the Civil Code, they are given power "to grant orders, to make inventories and sales of the property of successions."

Section 3997 of the Revised Statutes directs "that all sales of property of successions and all sales made pursuant to an order or decree of any court in this State may be made either by the sheriff, or by an auctioneer, or by the representatives of successions as the Court may order."

And no sale can be made by the representatives of a succession without the authority of an order of Court.

Civil Code, Art. 2622.

Donaldson vs. Hall, 7 Martin, New Series (La.), 113.

Succession of Bright, 38 La. An. 141.

Article 2623 of the Civil Code declares that when a sale is made "the adjudication made and recorded by the sheriff, auctioneer, or representative of a succession is a complete title."

Finally, Art. 2616 of the Civil Code declares the following sales to be *judicial sales:*

1. "Those which take place when the property of a debtor has been seized by order of a court to be sold for the purpose of paying the creditor.

2. "Those which are allowed in matters of succession and partition."

This Court has had occasion to examine into the authority and jurisdiction of the Probate Courts of the State of Louisiana in Simmons vs. Saul, 138 U. S. 439, and arrived at the conclusion that in proceedings before them for the sale of succession property, they act *in rem*, and that sales made

by them are strictly judicial sales. That decision has since been referred to by the Supreme Court of the State as a correct exposition of the law, in Gravenburg vs. Bradford, 44 An. (La.) 400. It seems, therefore, perfectly clear that all sales made under authority of Probate Courts in Louisiana are strictly judicial in character, and confer title on a purchaser by operation of the law which takes and appropriates the property of a decedent in accordance with the policy of the State without the consent or concurrence of any legal representative or heir.

This brings us to the question whether a sale of a *chose in action*, made by order of a Probate Court, is an assignment within the meaning of the act of 1875. We may assume that when the Congress used the words "assignment" and "assignee" in the act of 1875, it used them in the appropriate and ordinary sense. Says the Court of Appeals in Hight vs. Sackett, 34 N. Y. 447: "The idea of an assignment is essentially that of a transfer by one existing party to another existing party," quoting I Tomlin Law Dictionary—*Assigns*.

While an executor is sometimes declared in law to be the assignee of the testator, he takes by operation of law. The testator names the executor, but it is the law that makes him the assignee of the property. But a legatee can not be considered an assignee either in law or in the ordinary use of language. *Ibid.*

Assignments of this character, however, do not come within the ordinary meaning of the act of 1875, nor within the mischief of that statute, as we will show later in this brief.

The distinction between purely derivative titles and those which pass by operation of law is very clearly stated by this Court in Grignon's Lessee vs. Astor, 2 Howard, 319. Says the Court in that case: "On proceedings to sell real estate of an indebted intestate there are no adversary parties, the proceeding is *in rem*, the administrator represents the land; they are analogous to proceedings in admiralty where the only question of jurisdiction is the power of the Court over the thing, without regard to the persons who may have

an interest in it. All the world are parties. In the Orphans' Court, and in all courts who have the power to sell the estates of intestates, their action operates on the estate, not on the heirs of the intestate; a purchaser claims not their title, but one paramount by operation of law." See also McPherson vs. Cunliff, II S. & R. 428.

On the same principle it has been frequently held by this Court that heirs, legatees, administrators and executors succeed to the rights of the deceased by operation of law, and not by assignment within the meaning of the judiciary acts.

Childress vs. Emory, 8 Wheat. 548.
McNutt vs. Bland, 2 How. 15.
Rice vs. Houston, 13 Wall. 66.
Holmes vs. Goldsmith, 147 U. S. 161.

So it has been held that a receiver takes choses coming to his hands by operation of law, and is not subject to the disabilities of an assignee under those acts.

White vs. Ewing, 159 U. S. 36.

In New Orleans vs. Gaines, it was claimed that Mrs. Gaines could not sue in the Circuit Court to recover rents due citizens of Louisiana under written subrogations of their rights, because of the restrictions contained in the statute of 1875. But this Court held that although the plaintiff sued on equities derived from persons who could not maintain an action for the rents in the Circuit Court, this disability did not affect her. Said the Court: "Subrogation is not assignment. The most that can be said of it is that the subrogated creditor by operation of law represents the person to whose right he is subrogated. But we have repeatedly held that representatives may stand upon their own citizenship, irrespective of the citizenship they represent. The evil which the law intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments. But assignments by operation of law are not within the mischief of the law."

On the same principle it has been held that a voluntary assignment for the benefit of creditors under the insolvent laws of a State, of a claim against the United States, is a transfer

by operation of law, not within the prohibition of Sec. 3477, U. S. Rev. Stat., forbidding the assignment of such claims. Butler vs. Generelly, 146 U. S. 303.

The only case we can find which is seemingly opposed to the principle announced by the Court in the foregoing cases, is that of Seré vs. Pitot, 6 Cranch, 332, in which it is held that an assignment of a chose in action, by an insolvent to a syndic, under the insolvent laws of Louisiana, for the benefit of creditors, is an assignment within the meaning of the judiciary act of 1789. This decision, it is claimed, has been approved by the Court in the late case of Canal Bank vs. Dodson, 157 U. S., 205, but an examination of the opinion will show that the Court merely referred to Seré vs. Pitot for the purpose of showing that the Statute applies as well to equitable as to legal assignments, and for no other purpose. We think this early case has been overruled by the later decisions, but giving the decision the fullest effect, we submit that it has no application to judicial sales of the property of estates in which the purchaser, as in this case, takes title by operation of law.

Assignments under insolvent laws are generally voluntary, and they pass the title to property and choses by deed of transfer, which, it may be said, is the act of a living person, and not of the law, although the law permits the act to be done. Possibly, therefore, this class of assignments may come within the mischief of the Statutes.

But this consideration can have no application to the transfer of estates of decedents. Such estates are disposed of by statutes of distribution, which, acting upon the property, transmits estates in accordance with the policy of the State. No one can control the disposition of his property after death without the authority of the law of the country in which it is situated. Sir William Blackstone in his commentaries (Vol. II., C., I., 10-13.) considers the descent, devise, and transfer of property equally political institutions and creatures of municipal law, and not natural rights; and that the law of nature suggests that on the death of the possessor, the estate should become common and open to the next occu-

pant. Although some writers seem to doubt the existence of this law of nature to the extent claimed by Blackstone, all admit that the particular distribution of the property of decedents depends solely on positive laws. It follows that whether an estate is taken and sold to pay debts of the decedents, or applied to the payment of legacies, or delivered to legal heirs, it is the disposition of the law, and not of any person. It was the law acting on the property of Carr after his death, through the instrumentally of the Court of Probate, that gave plaintiff title to the warrants sued on in this case. Plaintiff became owner, therefore, solely by operation of law and not by assignment from any one. In this view of the case, the Circuit Court erred in supposing that the citizenship of the heirs of Carr, or of his legal representatives, affected the question of jurisdiction, as they did not in fact sell, and had nothing whatever to do with the devolution of title from Carr's succession to the plaintiff. We submit, therefore, that the judicial sale of the warrants was not an assignment either within the letter or the mischief of the Act of 1875.

A purchaser of the property of a decedent must, we think, be held to take title either through a legal subrogation, or as the legal representative of the deceased owner. In either case he acquires title by operation of law, and not by assignment, which implies a transfer by contract.

Wherefore, plaintiff in error prays that the judgment of the Circuit Court sustaining defendant's exception to its jurisdiction be reversed and set aside with cost, and that a new trial be awarded.

Respectfully submitted,

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